

Alltel Kentucky, Inc. and Communications Workers of America, Local 3310, AFL-CIO. Cases 9-CA-34577 and 9-CA-34617.

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On July 31, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel, Charging Party, and the Respondent filed exceptions and supporting briefs and the Respondent filed an answering brief to the exceptions of the General Counsel and Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

We agree with the judge that the Respondent's proposal concerning wages, submitted during bargaining over an initial contract, put the Union on notice that the Respondent did not intend to increase wages in January 1997 as it had done annually for the previous several years. The Union's failure to request bargaining in the face of such notice defeats any claim that the Respondent unlawfully discontinued the January increase.³ Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) when it withheld the increase.⁴

Contrary to our dissenting colleague, we do not believe the Respondent was required to be more specific than it was during its November negotiating session. During that meeting, in response to the Union's prior request for the Respondent's wage proposal, the Respondent presented the Union with the results of a wage survey it had

commissioned that showed that the Respondent's current wage scale was higher than the average for the sampled area.⁵ As the judge found, the Respondent informed the Union that, based on the survey, it did not intend to propose an increase in wages and that its position on a wage freeze would not change.⁶

The General Counsel and Charging Party argue, however, that the Respondent did not provide specific notification that it was thereby declining to give an upcoming increase that would be warranted under past practice. Indeed, the Charging Party asserts that Union Negotiator Dearing had no knowledge that the Respondent had a practice of annual wage increases and that he understood the Respondent's November proposal to concern merely the "concept" of economics in the contract. The General Counsel and Charging Party thus argue that the Union did not knowingly waive its right to bargain over the January increase.

We do not agree. It is difficult to construe the Respondent's proposal of "no increase" as meaning anything but no wage increase at all, regardless of what type, including any January increase.⁷ Given the unqualified breadth of this proposal, it is irrelevant that the Respondent made no concurrent reference to its prior practice or that the Union may not otherwise have been apprised of such practice.⁸ Having been notified of the Respondent's decision to grant no wage increase, it was incumbent upon the Union to request bargaining over that decision. It failed to do so. Thus we agree with the judge that the

¹ The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent's exception to the judge's Order is granted insofar as the Order apparently inadvertently indicates that the Respondent violated Sec. 8(a)(1) by interrogating employees concerning their union sentiments. As the Respondent points out, the complaint alleges, and the judge found, only that the Respondent coerced and restrained employees by informing them that the Respondent failed to give them an annual wage increase because of their support for the Union. We shall correct the Order and notice to conform to the judge's findings.

³ *Stone Container Corp.*, 313 NLRB 336 (1993). See also *Associated Milk Producers*, 300 NLRB 561, 563 (1990); *Gibbs & Cox, Inc.*, 292 NLRB 757 (1989); *Citizen's National Bank of Wilmar*, 245 NLRB 389 (1979).

⁴ It is clear that an overall bargaining impasse is not a condition precedent to a change in a term or condition of employment where, as here, the change concerns a discrete event which is scheduled to occur during the bargaining process. See *Stone Container*, supra. In the instant case, the discrete event was the January increase.

⁵ The parties had been meeting monthly since the March 20, 1996 certification. At the Union's request, however, the parties deferred discussion of economic proposals until they resolved some of the non-economic issues. The Union first requested the Respondent's wage proposal at the October bargaining session. The Respondent provided this proposal at the next meeting.

⁶ On cross-examination, the Union's representative, Dennis Dearing, who participated in the November bargaining session, testified that he didn't recall the term "wage freeze" being used, but made the following admission:

Q. And, further [the Respondent] told you that while it didn't propose to—it didn't propose a reduction in wage rates that it did propose no increase?

A. Yes.

⁷ Indeed, Union Representative Dearing testified that he informed the bargaining unit employees at a December 9, 1996 meeting that the Respondent was not offering any money in negotiations and that he would have been surprised if the Respondent had implemented a January 1997 wage increase, because it would have been inconsistent with the position the Respondent had taken prior to that at the bargaining table. Employee John Holt, a member of the Union's negotiating committee who was also credited by the judge, similarly testified that he did not expect a raise in January, given the Respondent's expressed attitude at the negotiating table. There is no tenable claim that employees did not know of the past practice.

⁸ The Union knew that the Respondent had completed a study showing that its wages were higher than average for the area. Thus, the Union could not have reasonably believed that the Respondent would nonetheless grant a January wage increase, which increase would have expanded the differential.

Respondent did not violate Section 8(a)(5) and (1) by withholding the January increase.⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alltel Kentucky, Inc., Shepherdsville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

“1. Cease and desist from informing its employees that they did not receive their annual cost of living wage increase because of their support for the Union.”

2. Substitute the attached notice for that of the administrative law judge.

MEMBER FOX, dissenting in part.

I agree with my colleagues' finding that the Respondent violated Section 8(a)(1) when Richard Allison, one of its supervisors, informed employees that they did not receive an annual January 1997 wage increase because the employees had selected the Union, during an election held the previous March, to be their collective-bargaining representative. I do not agree, however, that the Respondent acted lawfully in withholding a January increase. In my view, the Union lacked sufficient notice that the Respondent's wage proposal presented during the November 1996 contract negotiations—a proposal that there would be no increase in current wage levels—signified that the Respondent would be cancelling the increase which would likely have been given in January if past practice were followed. Accordingly, I would reverse the judge on this issue and would find that the Union's failure specifically to request bargaining on the January increase did not constitute a waiver and that the Respondent thus violated Section 8(a)(5) and (1) by failing to grant the wage increase.

The parties were bargaining for an initial contract following the Union's certification on March 20, 1996. Because the Respondent had agreed to the Union's request that the parties resolve certain noneconomic issues before negotiating over economic subjects, wages did not become an issue until October 1996, when the Union (having put a complete proposal on the table) asked the Respondent for a wage proposal. The Respondent then commissioned a wage survey for the Kentucky area and presented its analysis of the survey and its wage proposal at the November 13 meeting. According to the testimony of Dennis Dearing, the chief union negotiator (whom the judge appeared to credit regarding negotiations over the wage increase), the Respondent's chief negotiator stated

that, although the survey would justify reducing wages, the Respondent proposed only that wages would not be increased. It is undisputed that from 1983 to 1995, the Respondent had followed a practice of giving an annual winter cost-of-living wage increase; but, as Dearing testified, he knew nothing of the practice and the Respondent's representatives at no time discussed, or even referred to such a practice.¹ According to Dearing's testimony, he viewed their bargaining over wages as “bargaining the contract,” and he did not then know when the parties might reach agreement on a contract.

Under Board precedent, the Respondent was free both to bargain for a contract under which annual cost-of-living increases would not be given and, in the event no contract was agreed on by the end of January, to propose that, under established standards, no annual increase be given that month.² Because of its obligation to maintain the status quo during contract negotiations, however, the Respondent was not free to terminate the annual increase *practice* unless this was agreed to by the Union or the parties had reached a general impasse in contract negotiations and termination of the annual practice was part of the Respondent's final proposal.³ There is no finding that the Respondent was implementing a final contract proposal upon impasse. Thus, in order to forgo the January increase, the Respondent was obligated to put the Union on notice of its position that the particular increase was not warranted under established criteria, so that the Union would have an opportunity to bargain over the amount before the time for granting the increase arrived.⁴

As noted above, the Respondent made a general wage proposal of “no increases,” but failed to make any separate proposal concerning how the existing practice would be implemented in January. In my view, the Union's

¹ There was no allegation that the withholding of the increase was discriminatory, in violation of Sec. 8(a)(3), but the judge's finding that Supervisor Allison told employees they probably would have received an increase if they had not brought the Union in indicates that following past practice would mean granting an increase.

² *Stone Container Corp.*, 313 NLRB 336 (1993) (employer did not violate Sec. 8(a)(5) in withholding a periodic wage increase when it gave advance notice that no April increase would be given because application of established criteria for determining such increases warranted none and union failed to bargain over that proposal).

³ *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1018 (1996), *enfd.* 140 F.3d 169 (2d Cir. 1998); *Daily News of Los Angeles*, 315 NLRB 1236, 1237–1241 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996).

⁴ *Stone Container Corp.*, *supra*. Compare *Roper Corp.*, 263 NLRB 1073, 1074 (1982) (Notwithstanding employer's contract proposal to eliminate merit increase system, employer violated Sec. 8(a)(5) by failing to notify the union that annual merit increases would be withheld while contract was being negotiated), *enf. denied* 712 F.2d 306 (7th Cir. 1983). In denying enforcement, the court of appeals did not question the legal principles applied but found that the General Counsel had failed to prove lack of notice, especially in light of his failure to call the union negotiator as a witness. The court believed an adverse inference was warranted. 712 F.2d at 310. In the present case, as noted above, Dearing testified that he was told nothing about any withholding of an increase while the contract was being negotiated.

⁹ We agree with the judge, however, that the Respondent violated Sec. 8(a)(1) when one of its supervisors, Richard Allison, informed employees that they did not receive their annual wage increase because employees had selected the Union as their collective-bargaining representative.

negotiators could reasonably view the Respondent's "no increase" proposal as its proposal for the wage system that would be in effect under the contract and not as a proposal concerning interim conditions. Lacking adequate notice of the Respondent's intent concerning what action it proposed to take with regard to existing salary practices before a new contract was agreed to, the Union cannot properly be held to have waived its right to bargain over the amount of a January increase. Thus, I would find that the Respondent's withholding of that increase amounted to unilateral action in violation of Section 8(a)(5) and (1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform our employees that they did not receive their annual cost of living wage increase because of their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALLTEL KENTUCKY, INC.

David Ness, Esq., for the General Counsel.
William C. Moul, Esq., of Columbus Ohio, for the Respondent.
John L. Quinn, Esq., of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Louisville, Kentucky, on June 4, 1997,¹ pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on April 4. The complaint, based upon an original charge in Case 9-CA-34577 filed on January 28, and an original and amended charge in Case 9-CA-34617 filed on February 6 and 11, by Communications Workers of America, Local 3310, AFL-CIO (the Charging Party or Union), alleges that Alltel Kentucky, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

The complaint more specifically alleges that the Respondent engaged in several independent violations of Section 8(a)(1) of the Act including encouraging employees to decertify the Union, informing employees that pictures would be taken of them at work, in the event of a strike, and the pictures could be used as a reason for refusing to reinstate them, and informing em-

ployees that their annual cost-of-living wage increase was denied in retaliation for selecting and supporting the Union as their collective-bargaining representative. Additionally, the complaint alleges that the Respondent discontinued its practice of granting annual wage increases to its employees without prior notice to and affording the Union an opportunity to bargain with respect to the conduct and the effects of the conduct in violation of Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties after the conclusion of the hearing,² I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in providing telecommunication services, with an office and place of business in Shepherdsville, Kentucky, where it annually purchased and received goods and materials at its facility in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On March 20, 1996, the Union was certified as the collective-bargaining representative of a 23-person unit at the Respondent. Employee John Holt was designated as the spokesperson for the employees and served on the Union's negotiating committee.

The parties commenced collective-bargaining negotiations for 10 bargaining sessions culminating on January 20. The chief negotiator for the Union during the majority of the sessions was Dennis Dearing and Attorney William C. Moul served as Respondent's chief spokesperson. The parties did not achieve a contract during this period and on the date of the hearing still had not reached a collective-bargaining agreement.

In a union meeting held on December 12, 1996, the employees authorized a strike and Dearing apprised Moul of this fact on January 3. No strike took place up to and including the date of the hearing.

At all material times, Richard McClain held the position of president of Respondent and Richard Allison and Terry Edwards served as supervisors.

B. The 8(a)(1) Violations

1. Allegations concerning Richard McClain

The General Counsel alleges in paragraph 8(a) of the complaint that on or about January 21, McClain encouraged employees to decertify the Union.

On January 22, a meeting was held in the conference room of the Shepherdsville facility attended by McClain, Supervisor Richard Allison, Union spokesperson John Holt and employee Keith Walker. Prior to the meeting, Allison informed Holt that no discipline would be taken against Walker. The meeting was held because Walker allegedly made some threatening remarks

¹ All dates hereafter are in 1997 unless otherwise indicated.

² The Respondent's unopposed motion to correct the transcript, dated July 8, is granted.

to a fellow employee. At the commencement of the meeting, McClain stated that we need to be very careful about what we say to each other as things can be perceived as threats. These are tense times with what is going on between the Union and the Employer and a number of employees have mixed feelings. Holt testified that McClain then went on to state that the employees have been union for relatively a year and have not gained anything from it. McClain, according to Holt, then said you can talk to the Union and tell them you do not want to negotiate. Holt said, "I'm not the guy to decert [sic] the Union." McClain testified that he asked Holt why the employees had not organized their own local union and Holt responded that the Union would not permit them to do that because the local had less than 50 members. Holt, according to McClain, went on to state that he was working as hard as he could to represent the majority, even if the Union was to dissolve or drop the whole thing. McClain then asked if that was a possibility and Holt said no.

Walker testified that he heard McClain tell Holt that we have had the Union over a year and if we wanted to get rid of it, we could go to the Union. Holt, according to Walker, replied that McClain should talk to the employees who wanted to get rid of the Union as he still wanted union representation. Allison testified that Holt inquired of McClain if additional progress could be made in the negotiations between the parties. Holt, according to Allison, said if enough people wanted to drop this, they would, and he would support this. McClain then questioned Holt about this and told him that several employees had expressed different feelings about dissolving the Union. Holt said that he attempted to make things clear to everyone and McClain replied that he told several employees to discuss this with the Union but the employees said such an option was not available. The meeting concluded, according to Allison, with McClain stressing to Walker the seriousness of the incident and told him that any recurrence would require disciplinary measures.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

Considering the above recitation and the independent versions of what was said during the course of the January 22 meeting, I am not persuaded that McClain encouraged employees to decertify the Union. First, I note that it was Holt rather than McClain that used the word "decert" during the course of the meeting. Second, on January 23, Allison reduced his recollection of what was said by each of the participants in the meeting to handwritten notes which were introduced in evidence. The notes confirm that it was Holt who made the statement that if enough people wanted to drop this, they would, and he would support this. McClain then questioned this and explained that several employees had said different things about not getting accurate information and wanting to dissolve the Union and he told these employees to discuss the subject with the Union. Lastly, while the testimony of Holt and Walker is similar in certain respects, I find that Walker's version of the McClain conversation does not rise to the level of a coercive statement. In this regard, Walker testified that McClain stated, "if we wanted to get rid of the Union we could go to the CWA and get rid of it."

Under these circumstances, I am unable to find that McClain encouraged employees to decertify the Union. Rather, I find that it was Holt who brought up the subject that if any of the employees showed an interest to dissolve the Union, he would support that. McClain then followed up on this statement and told Holt that several employees expressed this position to him and he suggested that the employees talk to the Union. Therefore, I recommend that paragraph 8(a) of the complaint be dismissed.

2. Allegations concerning Richard Allison and Terry Edwards involving the use of cameras

The General Counsel alleges in paragraph 8(b) of the complaint that about January 23, Allison and Edwards informed employees that they would be taking employees' photographs at work so that, in the event they went on strike, the photographs could be used by Respondent as a reason for refusing to reinstate them.

Employee Marvin Hallinan testified that in a January 1997 conversation with Edwards at the Mt. Washington central office, Edwards informed him that the Respondent bought all of the supervisors' cameras and gave them notepads to carry in their trucks. In reply to Hallinan's question of why, Edwards responded that the supervisors were supposed to go around and take pictures of employees if they caught them doing anything wrong and make notations. In a separate conversation with Allison several days later at the central office, Hallinan said to Allison, "well Richard, this is a Kodak moment I suppose, isn't it?" According to Hallinan, Allison laughed and then Hallinan asked what is the purpose of taking these pictures? Allison said, after the strike was over they could come back and use these pictures to hire back who they wanted to.

Employee Thomas Drury testified that he had a conversation with Edwards in January 1997, on the porch of the central office and fellow employee James Stottman was present. Drury asked Edwards about some rumors going around that the Respondent was in the process of purchasing cameras. Edwards replied that McClain had purchased two cameras and some notepads for each of the supervisors who were to use them to get pictures of employees doing things wrong that could be used against them after the strike. Stottman testified that Edwards stated during the conversation that the cameras were authorized by McClain and were to be used for safety violations or if the employees were doing anything wrong.

Supervisor Edwards credibly testified that he received two cameras from his supervisor on or about January 18. The following Tuesday, January 22, a staff meeting was held for all supervisors and McClain told those in attendance that they were anticipating a strike and the cameras should be used in case any vandalism took place.³ Edwards admits that he had a conversation with Drury about the cameras on the porch of the central office and told him that he was instructed to use the cameras for any type of vandalism in the event of a strike.

Allison testified that he never had a conversation with Hallinan about cameras nor did he have a conversation with Hallinan where the words "this is a Kodak moment" were used. Additionally, Allison testified that he never told Hallinan that cameras were going to be used for the purpose of seeing that

³ I find that after the union meeting took place on December 12, 1996, it was common knowledge throughout the facility that a strike vote was taken and authorized.

some people were not rehired or brought back to work after the strike.

Richard McClain credibly testified that the cameras were purchased for the sole purpose of preparing the Respondent's strike plan. Thus, the Respondent wanted to document any type of property that might be damaged, in the event of a strike, or to record any acts of vandalism that occurred. This is a legitimate plan and photographs are an appropriate mechanism to record any acts of strike misconduct which could be used to deny reinstatement to any employees who engaged in such conduct. See, *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enfd.* 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986).

While I conclude that Hallinan did have the conversation with Allison about cameras and used the words "this is a Kodak moment", Hallinan acknowledged on cross-examination that it was his understanding that the purpose for the cameras was to record wrongdoing while the employees were performing their job functions. Likewise, Stottman testified that Edwards told him that the cameras were to be used if the employees were doing anything wrong.

Under these circumstances, I do not find that the Respondent informed employees that photographs would be taken at work so that, in the event they went on strike, the photographs could be used by Respondent as a reason for refusing to reinstate them. Rather, I find that a number of supervisors informed employees that, in the event of a strike, the cameras were to be used to record property damage or acts of vandalism. As found above, if such acts of vandalism took place, photographs could be used to deny reinstatement to any employees who engaged in such misconduct. Therefore, I recommend that paragraph 8(b) of the complaint be dismissed.

3. Allegations concerning Richard Allison

The General Counsel alleges in paragraph 8(c) of the complaint that in early January 1997 and again on January 20, Allison informed employees that the Respondent denied them their annual January 1997 wage increase in retaliation for selecting the Union as their collective-bargaining representative.

Employee Harold Walker testified that in early January 1997 at the Shepherdsville office, while he was about to clock out, Allison said, "that some of Walker's co-workers did not like to be accountable for their time and wanted the Union but the rest of us would pay." Walker said, "well, I guess we are not going to get a raise are we?" Allison replied, "that if we hadn't been messing with or voted in the union, we would have probably got a four or five percent raise this year because we have been transferred into the Northeast region now and they all receive real good raises." Allison denied that he had a conversation with Walker concerning the reason for the Respondent not offering or instituting an increase in wages nor did he tell Walker that the employees will suffer for the Union being brought in.

Employee Marvin Hallinan testified that on January 20, at the Shepherdsville central office, he had a conversation with Allison about the Union and the subject of a strike. Allison informed Hallinan that a strike would be useless because the Respondent would bring in three people to one and pay them seventeen dollars an hour to get the job done. The discussion continued and Hallinan said, "Richard, I heard we weren't going to get a raise for two years." "Why is that?" Allison replied, "that's just a little slap on the hand for going union." Hallinan also said to Allison, that he heard a rumor that we are going to be sold at the end of the year and if that is the case,

why don't they just give us a contract? Allison said, they want to set an example with us for the rest of the nonunion sectors of the company so they will not petition a union. Allison denied having a conversation with Hallinan in January 1997 in which he said that the reason employees had not gotten a raise in pay was because it was a slap on the hand for going Union nor did he ever have a conversation with Hallinan at which the subject of pay raises came up. Allison testified, however, that he did have a conversation at the Shepherdsville office with Hallinan in January 1997 about the Union, and asked him whether pay was the main issue. Hallinan replied, that the main issue was seniority not pay and a discussion took place about that issue. Allison told Hallinan that the Respondent would never support a seniority clause or operate under that environment.

At all material times, Allison denied having individual conversations with employees Hallinan and Walker wherein the subject of pay raises was discussed or that he made any references about the Union concerning the employees not receiving a pay raise. It should be further noted that Allison also denied having a conversation with Hallinan about cameras or a conversation that started with or included the words "this is a Kodak moment."

I fully credit the testimony of the above-noted employees and find that Allison made the coercive and threatening statements attributed to him. Such statements violate Section 8(a)(1) of the Act. See *Conagra, Inc.*, 248 NLRB 609, 615 (1990) (threatening employees with loss of benefits) and *House Calls, Inc.*, 304 NLRB 311, 319 (1991) (coercive interrogation). The testimony of each employee seemed to hang together and did not appear fabricated. Indeed, each employee testified to individual conversations with Allison and I conclude their testimony was clear and convincing unlike Allison's which was defensive and appeared contrived. Likewise, it was common knowledge throughout the facility that the parties were in the midst of collective-bargaining negotiations and the subject of wages was a contentious issue. Allison categorically denied having any of the above conversations and gave a blanket denial when asked whether he interrogated or threatened employees about the Union. Contrary to Allison, I find that each of the above conversations took place as testified to by the employees.

Accordingly, I find that the General Counsel met his burden with respect to paragraph 8(c) of the complaint.

D. The 8(a)(1) and (5) Violations

1. Background

Respondent concedes that from 1983 through 1995 in December of those years, a cost of living wage increase was given to its employees. The issue in this portion of the case involves the Respondent's decision to discontinue the annual cost of living increase in January 1997. While the Respondent takes the position that any general increase is granted when it is appropriate and when circumstances so dictate, the record establishes a consistent and established past practice of granting the annual wage increase.

After the Union was certified on March 20, 1996, it requested to engage in negotiations for an initial collective bargaining agreement. Those negotiations commenced on May 15, 1996.

2. The collective-bargaining negotiations

At the commencement of negotiations on May 15, 1996, the Union was represented by national representative Nell Horlander who retired after the first four bargaining sessions. National representative Dennis Dearing replaced Ms. Horlander and attended his first bargaining session on August 30, 1996. Respondent was represented throughout the negotiations by chief negotiator Attorney William C. Moul and President Richard McClain.

During Dearing's first negotiation session, he requested to defer any active discussion of wages until an attempt was made to resolve the non-economic matters. The subject of wages was first discussed in an October 1996 negotiation session when the Union raised the question of when the Respondent would make some economic proposals.

In order to prepare for the portion of the collective bargaining negotiations regarding wages, the Respondent commissioned a wage survey for the greater Louisville market. On November 13, 1996, the Respondent provided at the negotiation session on that date, the analysis of wages and benefits that it used in formulating its economic position. The survey shows that Respondent's wages were above even the metropolitan Louisville levels. During that session, Dearing testified that the Respondent informed the Union that it believed the wage survey supported a reduction in wage rates but that it did not intend in 1997 to propose a reduction in wages for employees. Likewise, Dearing testified that during the November 13, 1996 negotiation session, the Respondent informed the Union that it did not intend to propose an increase in wages and its position on a wage freeze would not change.

3. Events between November 13, 1996, and the last negotiation session on January 20

In the December 12, 1996, union meeting that authorized and approved the strike vote, Dearing informed the membership that the Respondent was not proposing to offer a wage increase in January 1997. During that meeting, no person in attendance inquired about the January cost-of-living increase. Likewise, no employee inquired about such an increase after it was discontinued in early 1997.

On January 3, Dearing advised Respondent's chief negotiator, Moul, that the Union had taken a strike vote and obtained approval for a strike.

4. The January 20 negotiation session

In this last negotiation session, the parties were still apart on the issues of seniority, promotions, layoff and wages. The Union informed Respondent that each of those items was a strike issue and officially apprised the Respondent that a strike vote was taken and approval obtained. Both parties agreed that the Federal Mediation and Conciliation Service (FMCS) would not be helpful to resolve the above issues and Dearing apprised an FMCS mediator to this effect prior to January 20. During the course of the meeting, the Respondent told the Union that they proposed a short term contract with no additional increase in wages. At the conclusion of the meeting, Moul told Dearing that he did not believe the Respondent was willing to change its position with respect to any of the outstanding issues but that he would review it with the Respondent to be certain that it accurately represented their position. By letter dated January 21 from Moul to Dearing it states in pertinent part:

This will confirm that the statements I made yesterday with reference to the Company's position are accurate. That is, the Company is not willing to modify the positions it presently has presented at the bargaining table with reference to layoff, promotions and wages. This will also reconfirm that the Company agrees with your assessment as to the potential use of FMCS. That is, we agree that the parties have fully communicated and that mediation would serve no purpose.

5. Conclusions

The General Counsel contends that since 1983 the Respondent or its predecessor gave annual cost of living wage increases every year about December or January. Thus, the wage increases became an established practice and ripened into a term and condition of employment. Since the Respondent did not give the Union notice and an opportunity to negotiate over the discontinuance of the practice, a violation of Section 8(a)(1) and (5) of the Act occurred.

The Union supports the theory of the General Counsel and further argues that bargaining concerning the wage increase was driven by the simultaneous processing of a decertification petition in the Respondent's state wide unit in Georgia. In this regard, a decertification campaign commenced in late summer and early fall 1996, the decertification petition was filed on January 7, and the election was held on April 1 and 2.

The Respondent concedes that from 1983 through 1995, an annual cost-of-living wage increase was given to its employees but argues that this general practice did not ripen into a term and condition of employment because the written policy of the Respondent provides that any general wage increases are granted only when it is appropriate and when circumstances dictate. Moreover, throughout the negotiation period between May 15, 1996 and January 20, the Respondent consistently informed the Union that circumstances did not justify any sort of a wage adjustment and proposals advanced by the Respondent included a one year agreement without a wage increase or wage freezes for the entire contract period.

An employer may not unilaterally alter terms and conditions of employment without affording the union representing its employees a meaningful opportunity to negotiate in fact. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Pay increases or adjustments which are established and regular events are conditions of employment not subject to unilateral change. *Lamont Apparel*, 317 NLRB 286 (1995). In *Daily News of Los Angeles*, 315 NLRB 1236 (1994), the Board held that in its view, the standard set forth in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970), which looks to whether a change has been implemented in conditions of employment, captures best what lies at the heart of the *Katz* doctrine. It neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement and condemns the conduct if it has. In my opinion, the evidence shows that the parties did not negotiate to impasse or reach agreement on the annual cost-of-living wage increase.⁴ However, the discussion does not end here.

⁴ Prior to December 1996 and early January 1997, the period of time when the annual cost-of-living wage increase was routinely given, the parties only engaged in one meaningful negotiation session when the subject of wages was discussed.

The gravamen of the General Counsel's case is that the Respondent did not give the Union notice or an opportunity to negotiate over the discontinuance of the annual cost-of-living wage increase. Contrary to this position, the Respondent argues that while it did not specifically inform the Union that the January 1997 increase would be discontinued, it apprised the Union on November 13, 1996, during negotiations for the parties' initial collective bargaining agreement, that no wage increases would be forthcoming.

In agreement with the Respondent, I find that during negotiations it articulated to the Union that no wage increases would be forthcoming and this served as sufficient advance notice that it intended to discontinue the annual cost-of-living wage increase normally given in December and January. It was then incumbent on the Union to request to negotiate the discontinuance of the annual cost-of-living wage increase. The evidence shows that this did not occur. In this regard, Union Chief Negotiator Dearing testified that throughout the history of the negotiations there were zero discussions concerning the Respondent's annual December or January wage increase and at no point in time did the Union request to bargain about that subject. Dearing also acknowledged that in the December 12, 1996 union meeting, he informed the union membership that the Respondent was not proposing to offer a wage increase and no person in attendance at the meeting inquired about the annual January increase nor did any employees raise the issue in January 1997. Likewise, Union Negotiator John Holt testified that he never asked about the January 1997 annual wage increase during negotiations or at the January 22 meeting, and admitted that he did not expect such a raise in January 1997.

Under the particular circumstances of this case, I find that the Union had sufficient advance notice that the Respondent did not intend to give any wage increases in January 1997, which encompassed the annual cost of living increase, and its failure to request negotiations on this subject privileged the Respondent's discontinuance of the annual wage increase in January 1997. Therefore, contrary to the allegations in paragraphs 9 through 11 of the complaint, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act when it discontinued its practice of granting annual wage increases to its employees and recommend that those allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), 2(6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees concerning their union sentiments and informing employees that they did not receive their annual cost-of-living wage increase because of their support for the Union.
4. Respondent did not engage in violations of Section 8(a)(1) and (5) of the Act when it discontinued its practice of granting annual wage increases to its employees.
5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Alltel Kentucky, Inc. Shepherdsville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy, and activity.

(b) Informing its employees that they did not receive their annual cost-of-living wage increase because of their support for the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Shepherdsville, Kentucky, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 27, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively question you about your union support or activities.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT inform our employees that they did not receive their annual cost of living wage increase because of their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.